

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN REPLY REFER TO: 1800B3-CRB

December 14, 1995

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In re: KFKQ(FM), New Holstein, WI., Application to Extend Time to Construct
File No. BMPH-950417JB

Dear Counsel:

We have on file the above-captioned application for unbuilt station KFKQ(FM), New Holstein, Wisconsin, filed on behalf of the permittee, Frederick W. Kinlow, d/b/a FWK Broadcasting Co. ("FWK"). We also have before us a "Petition"¹ filed against the extension request submitted by Mark Heller ("Heller"), and FWK's Opposition to that petition. For the following reasons, we will deny FWK's application.

An application to extend time to construct must satisfy 47 C.F.R. § 73.3534(b) by showing either that substantial progress toward completion of construction has been made or that a circumstance beyond the permittee's control prevented completion of construction and that the permittee took all possible steps to resolve the problem and proceed with construction. We have noted that "[i]mplicit in this requirement is the fact that a permittee's extension application will be judged according to the progress made during the most recent construction period." *See Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259, 5259 (1991).² In *Panavideo*, we also pointed out that because each extension application presents different facts, "some situations might warrant several extensions over a period of years where a permittee continues to make steady progress, while another permittee might not justify even a first extension." *Id.* at 5260.

As justification for its instant extension request, filed on April 17, 1995, FWK claims that factors beyond its control precluded construction during the most recent period. Specifically, FWK states that Economy R.F., its antenna tower contractor, began construction of the antenna

¹ This "petition" will be treated as an informal objection since applications for extension of construction permits are not subject to petitions to deny. *See* 47 C.F.R. §§ 73.3584(a); 73.3580(a)(4); 47 U.S.C. § 309(c)(2)(d).

² The Commission has broad discretion in determining whether or not substantial progress toward completion of construction has been made, or whether the circumstances alleged to have prevented construction constitute circumstances beyond the control of the applicant. *See New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 365 (D.C. Cir. 1987).

tower during February 1995, with construction to have been completed in late March 1995. FWK claims that severe winter weather forced cessation of construction, and that the conflicting schedule of the construction crew delayed its return. Nonetheless, according to FWK, completion of the antenna tower was anticipated during May 1995. In his objection to the extension request, Heller alleges generally that FWK has "used the process of amending applications" to delay, not expedite, the construction process, and that further extension is not warranted.

On the record before us, we conclude that the circumstances alleged by FWK to have prevented construction fail to warrant further extension, and that any delay in completing construction was due to FWK's own choosing and not due to circumstances beyond its control. In this regard, we note that FWK's original construction permit was granted on June 26, 1987 with construction to have been completed by December 26, 1988. In connection with its first extension request, FWK cited the pending proposals to modify FM station WGGQ, Waupun, Wisconsin, to a Class C-2 station, which in turn required changing the operating frequency of station KFKQ and restricting the transmitter site to land not under control of FWK, as a circumstance beyond its control which prevented construction. This problem was resolved when the Commission ordered station KFKQ to change frequency from Channel 258A to Channel 226A in FCC Docket No. 88-270. Thereafter, we granted FWK's extension request on February 28, 1989. Since then, FWK has submitted five additional extension requests and two modifications.

Pursuant to the rationale stemming from *Panavideo*, our focus is necessarily on the extension request before us and information submitted with it, including relevant pleadings. Nonetheless, the entire case history must be considered to obtain the proper context. Here, we first note that in neither the instant application, nor in any of its previous extension requests, has FWK supported its assertions with corroborating documentation. We have no evidence to support anything that FWK is claiming, including whether or not it currently has a site. Second, our decisions to grant FWK's previous extension requests were based on a combination of "substantial progress" analyses or factors "clearly beyond the control" of FWK. *See* 47 C.F.R. § 73.3534 (b)(2)(3). However, as noted in relevant precedent, cited above, a permittee's extension application will be judged according to the progress made during the most recent construction period, in this case between October 17, 1994, when we granted FWK's fifth extension request, and April 17, 1995, when this extension period expired. During this period, FWK has made no progress toward completion of construction. As justification, FWK maintains, in essence, that it was impossible for it to obtain a tower contractor, who was both willing and able to do the job, during the period between the time when its second construction permit to replace the original, expired permit³ was granted on May 26, 1993, and when its sixth extension request was filed on April 17, 1995, a two-year period. In the absence of supporting documentation, we find it implausible that FWK was unable to locate a company capable of erecting a tower if it were truly committed to doing so.

Moreover, FWK cannot rely on our past acquiescence concerning its failure to submit corroborating documentation for its claims. The prior grants were based on our reliance on FWK's good faith concerning its assertions. Here, the original construction permit was outstanding for over three years prior to its expiration in September 1990. The second permit was granted almost three years later in May 1993, and now 30 months later virtually no progress has been made, and absolutely none in the past 6-12 months. Despite repeated promises that it would

³ FWK's original construction permit expired on September 7, 1990. FWK late-filed its third extension request on November 8, 1990.

be on the air by now, FWK has still not commenced actual construction of its tower. We find compelling that in its fifth extension request, dated August 15, 1994, FWK claimed, "[a]ll that remains is completion of the station antenna/tower transmission facility ... It is anticipated Station KFKQ(FM) shall be operational on or before than (sic) October 26, 1994."⁴ In support of the instant extension request, FWK reiterates this representation but substitutes the anticipated date of commencement of operation to May 31, 1995. From its showing, we cannot conclude that FWK is unequivocally committed to complete construction.⁵ We also note that FWK's decision not to complete construction, because of difficulty arising from using an unwilling or negligent tower erector, is a private judgment and does not provide a basis for extension of the instant construction permit, where, as here, expeditious efforts to overcome such setbacks have not been pursued. *See Greenfield Television*, 2 FCC Rcd 4332 (1987) (extension request denied because the permittee failed to make diligent efforts to overcome setbacks after a significant time had passed).⁶

Furthermore, a review of the documents submitted in support of the instant application has revealed certain unexplained factual inconsistencies.⁷ Although we are concerned about these apparent discrepancies in FWK's representations, since we are denying the application to extend time to construct and cancelling the construction permit, we do not find designation for hearing on issues of misrepresentation or lack of candor to be appropriate at this time. Instead, we caution FWK to take greater care ensuring the accuracy of any of its future communication with the Commission.

⁴ See Exhibit 1, p. 1, to FCC Form 307 Application for Extension of Broadcast Construction Permit.

⁵ In this regard, we note that we have denied extension requests in which the applicant has represented a higher level of commitment than FWK has in the present case. *See, e.g., New Orleans Channel 20, Inc. (WULT-TV)*, 104 F.C.C. 2d 304 (1986).

⁶ *See also Cidra Broadcasters, Inc.*, 2 FCC Rcd 230 (1987); *Hasler Productions, Inc.*, 2 FCC Rcd 811 (1987) (entrustment of part of a station's construction to another entity that results in unforeseen delays is not a factor beyond the permittee's control).

⁷ In its extension request dated April 17, 1995, FWK states that "Economy R.F., the [its original] antenna tower contractor began construction ... during February 1995." (See Exhibit 2). Yet, in its Opposition dated August 28, 1995, FWK reveals that "Economy R.F., the company originally scheduled to erect the tower in May of this year, went out of business." (See p. 2, para. 2). We are unable to reconcile the representations that construction was both begun "during February 1995" and "originally scheduled ... in May [1995]" and FWK has offered no explanation for such inconsistency.

As further represented in its Opposition, FWK asserts that a new tower erector has been contacted and that the tower will have been erected and the antenna mounted by mid-September, with construction completed by October 31, 1995. We are skeptical of this representation considering that no supporting documentation has been submitted. Moreover, FWK's most recent assertion regarding its future intention to construct fails to persuade. *See Community Service Telecasters, Inc.*, 6 FCC Rcd 6026 (1991) (a permittee's representation of its future intention to build cannot overcome its failure to make any progress within the relevant construction period).

Accordingly, the application for extension of time in which to construct filed by Frederick W. Kinlow, d/b/a FWK Broadcasting Co. (BMPH-950417JB) IS DENIED, the construction permit IS CANCELLED, and the call sign IS DELETED. Based on our action, the informal objection filed by Mark Heller IS GRANTED to the extent indicated herein.

Sincerely,

Linda Blair, Acting Chief
Audio Services Division
Mass Media Bureau

cc: Mark Heller
Frederick W. Kinlow